Supreme Court, U. S.
FILED
DEC 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-606

LUMBER, PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362,

Appellant,

v.

ROBERT A. WONDZELL AND THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS,

Appellees.

On Appeal From the Supreme Court of Alaska

MOTION OF APPELLEE ROBERT A. WONDZELL TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee Robert A. Wondzell hereby moves this Court pursuant to Rule 16 (b) and 16 (c) of the Rules of the Supreme Court of the United States to dismiss the appeal of Lumber, Production and Industrial Works Local 2362 as it fails to present a substantial federal question or, alternatively, to affirm the judgment of the Supreme Court of the State of Alaska.

Should the Jurisdictional Statement of the Appellant be treated as a Petition for Certiorari, appellee Robert A. Wondzell respectfully requests this Court to deny the petition for reasons stated herein.

I.

STATEMENT OF THE CASE

A more definitive summary of the facts is stated by the Supreme Court of the State of Alaska in its Opinion as found at Appellant's A.17, paragraph 3, to paragraph 3 of Apellant's A.20.[1] The Alaska Supreme Court found that "[a]ll parties have stipulated to the nature of Seventh-day Adventist beliefs on compulsory unionism, and to Wondzell's good faith adherence to those beliefs. Wondzell and others of his faith believe that it is contrary to God's will for them to associate with labor organizations. . . . They believe that economic coercion such as strikes and boycotts, is not a proper means for even the most legitimate and desirable ends. Furthermore, they are concerned that a labor union demands of them loyalty to earthly goals which is contrary to their first loyalty to God.

"Paying money to the union without joining it is not an acceptable compromise for Wondzell. Giving financial support to a union, as well as having one's name on its membership rolls, is unacceptable to Adventists. . . .

"At trial, the evidence showed that Wondzell had proposed to make monthly payments to the Multiple Sclerosis Society in lieu of union dues, and to forego all union benefits. The employer was willing to accept this compromise. The union, however, refused to accept it." Appellant's A.18 & 19.

This factual finding is in contrast to Appellant's assertion on page 8 of its Jurisdictional Statement that Robert A. Wondzell's "offer would enable him to

[1] "Appellant's A." refers to the Appendix to Appellant's Jurisdictional Statement.

receive all the fruits of collective bargaining without paying his share of the costs." Seven times in its Jurisdictional Statement Appellant charges "free rider." Yet Robert Wondzell had agreed to forego all union-based benefits and still continue paying an amount equal of dues to charity. In *Yott* v. *North American Rockwell Corp.*, 602 F.2d 904 (1979), the Ninth Circuit endorsed the type of accommodation here complained of and defined as free riders "those who pay neither union dues nor the equivalent thereof to a charity." 602 F.2d at 909. Under this definition Robert Wondzell thus is not a free rider nor would his actions encourage any others to follow the same course absent religious conviction.

Appellant asserts on page 9 of its Jurisdictional Statement that there was testimony that other employees were threatening to withdraw their support of the union if Wondzell did not pay dues. At trial Appellant called the financial secretary of Local 2362. He testified that the union could only offer non-membership and that Robert Wondzell still had to pay his dues of $6.75. Tr. 156.[2] He explained that of the dues, a per capita tax went to the International, another per capita tax to the Western Council, and the remaining $2.50 was placed in the contingency fund. Tr. 157. The only undue hardship of accommodation ever alluded to by Appellant in the record was the hearsay mention of two employees who reportedly said they would not pay dues if Wondzell did not have to. However, they have not in fact stopped paying dues and the witness admitted he did not even know if they were serious. Moreover, this testimony was not admitted to indicate the truth of any matter asserted but only to permit an explanation of the union's action. Tr. 159, 160-166.

[2] "Tr." refers to the trial transcript.

II.

ARGUMENT

A. The Question Presented Is Not Substantial

This Court has already denied certiorari in three cases involving substantially the same issue presented by this appeal: *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Anderson* v. *General Dynamics*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 422 U.S. —— (1979); and *Cooper* v. *General Dynamics*, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom. International Association of Machinists and Aerospace Workers* v. *Hopkins*, 433 U.S. 908 (1977).

In *Anderson*, the Court of Appeals held that substitute payments to charities by a religious objector do not cause undue hardship to labor unions as a matter of law. In *Burns*, the Court of Appeals found that that the loss by the union of one worker's dues of $19.00 is *de minimis*. Upon rehearing, the Alaska Supreme Court based its opinion on these decisions. The facts in *Wondzell* are even more persuasive than those in *Burns* and *Anderson*.

Although not directly stated, Appellant apparently raises a preemption issue as to the applicability of the Alaska State Human Rights Act to collective bargaining agreements. On page 2 of its Jurisdictional Statement Appellant speaks of "federally sanctioned contract rights" and complains on page 19 that the Alaska Supreme Court has judicially sanctioned an exception to § 8(a)(3) of the National Labor Relations Act. Appellant's motion to dismiss Wondzell's action in the trial court rested on preemption grounds. The Alaska Supreme Court noted: "When the appeals were

taken a question existed as to whether the National Labor Relations Act precluded state jurisdiction over this case. Our recent opinion in *Bald* v. *RCA Alascom*, 569 P.2d 1328 (Alaska 1977) is dispositive. We there held that the courts of Alaska do have jurisdiction over this type of case. There is no reason to discuss the question further in this opinion." Appellant's A.17. The *Bald* decision appears at Appellee's A.1.[3]

Citing numerous preemption analyses of this Court and, in particular, *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963), where state anti-discrimination laws were permitted to be applied to racial discrimination in collective bargaining agreement, the Alaska Supreme Court in *Bald* noted: "Its purpose [Railway Labor Act] of regulating union activity would in no way be frustrated by enforcing state civil rights laws. Even if the purpose of federal and state laws were the same, [this] Court said, there is no preemption unless enforcement of the state law would in some way frustrate the aims of the federal one." 569 P.2d at 1332 (citation omitted). The Alaska Supreme Court also noted that this Court has recognized in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), that there are properly multiple forums in which to seek remedies for racial discrimination. The Alaska Supreme Court in *Bald* concluded:

> The National Labor Relations Act and the state and federal civil rights act were enacted 30 years apart, each in response to one of the most monumental social crises of the century. They were enacted in 1925 to alleviate industrial strife and improve the lot of workers. 29 U.S.C. § 151. It was

[3] "Appellee's A." refers to the Appendix to this Appellee's Motion to Dismiss or Affirm.

substantially amended in 1947 to prevent abuses by unions of the power that the 1935 act had given them. *Id.* §§ 141, 151. The civil rights laws were passed in an attempt to prevent the use of irrelevant and stigmatizing criteria to bar persons from employment for which they were well qualified. *See* AS 18.80.200 [Alaska Human Rights Act.]

We have concluded that there is nothing necessarily inconsistent in these aims, and that the laws Alaska has enacted to promote the latter purpose need not give way to the federal laws enacted for the former purpose. We hold that the National Labor Relations Act does not preempt AS 18.80 and does not deprive the courts of this state of jurisdiction to hear the instant case.

659 P.2d at 1335.

In *Anderson* v. *General Dynamics, supra,* 589 F.2d at 400-01, the Ninth Circuit recognized "that there is both tension and conflict between the legitimate interests of the Union in preserving the benefits of union security agreement, which are valid under the National Labor Relations Act. . . , and the accommodation requirements of Title VII. . . . The balance has been struck, however, in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without undue hardship to the Union or the employer" (citations omitted).

Appellant offered no evidence of undue hardship in the proceedings below. Inferred only were possible grumblings. As the Ninth Circuit stated in *Burns* v. *Southern Pacific Transportation Co., supra,* 589 F.2d at 407: "As we noted in *Anderson* v. *General Dynamics Convair Aerospace Division, supra,* undue hardship re-

quires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief."

B. The *Wondzell, Burns* and *Anderson* Decisions Are Sound

Functionally, Appellant is asking this court to review the *Burns* and *Anderson* cases, in which this Court already has denied certiorari. In *Burns* the Ninth Circuit properly applied the *de minimis* test of *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63 (1977). The court found that the union had made no efforts to accommodate Burns's particular religious beliefs. Such is the case as well with Robert Wondzell. The offering of non-membership in the union with continued payment of union dues is meaningless. In n. 8 to its Opinion, Appellant's A.28, the Alaska Supreme Court found that this offer of the equivalent of an agency shop did not reach Robert Wondzell's religious objections to contributing money to the union. Indeed, this offer is only that which already is mandated by law. This Court long ago recognized that the condition of membership for purposes of the union shop is satisfied as long as dues are paid. *NLRB* v. *General Motors Corp.,* 373 U.S. 734 (1963).

In *Hardison* the employer had demonstrated undue hardship as the proposed four-day work week would have effectively required preferential treatment on the basis of religion for Sabbatarians causing sacrifices or dislocation in work schedules of fellow workers or requiring the employer to hire outsiders to work Saturday shifts at premium wages. This Court accordingly held that where the impact upon co-workers or costs are greater than *de minimis,* undue hardship is demonstrated. Applying this test in *Burns* the Ninth Cir-

cuit concluded that the loss to the Union of $19.00 per month union dues was indeed *de minimis*. Here Appellant will lose only $6.75 per month. The loss of such an amount is not comparable to the infringement upon seniority rights in *Hardison*. Here as in *Burns* and *Anderson* there was no factual showing that any problems would necessarily innure with accommodation. In fact the Alaska Supreme Court in its opinion on rehearing specifically noted:

> The record reveals no employee other than Wondzell who is subject to the local's jurisdiction and who shares Wondzell's theological anti-union beliefs. Since union dues are only $6.75 per month, the hardship to the Union cannot be regarded as undue. If at some future time the union experiences a wide-spread refusal to pay dues based on professed religious beliefs, undue hardship may be established.

Appellant's A.36.

In *Anderson*, the Ninth Circuit rejected the contention that nonpayment of union dues would be undue hardship as a matter of law. The court followed the Sixth Circuit's decision in *McDaniel* v. *Essex International, Inc.*, 571 F.2d 338 (1978), with which it found Anderson to be "almost identical." 589 F.2d at 401. In *McDaniel*, the Court of Appeals recognized that there was no factual basis in the record for the district court's finding that there would be per se undue hardship in the foregoing of union dues. The *Anderson* court noted:

> Here, as in *McDaniel*, neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.

589 F.2d at 402.

Similarly, the Alaska Supreme Court rejected the trial court's finding of undue hardship inasmuch as it had no basis in fact but was only a general subjective conclusion. Appellant's A.14.

Nonetheless, Appellant maintains on page 15 of its Jurisdictional Statement that "free riders create significant morale problems within the work force with their concomitant costs in decreased efficiency, industrial peace, and stability." There is nothing in the record to support this contention. Indeed, the AFL-CIO has supported such accommodations since 1965 as is reflected in the Statement by the AFL-CIO Executive Council, which is printed at Appellee's A. 14.

Contrary to the Appellant's assertion on page 18 of its Jurisdictional Statement, the 1974 Health Care Amendment to the National Labor Relations Act, 29 U.S.C. § 169, does not mandate that employees with religious objection to union membership contribute the equivalent of their dues to charity. The amendment states only that such employees "may be required" to so contribute. However, the amendment represents an absolute exemption and not a mere reasonable accommodation.

Similarly, Appellant's reference, in its Jurisdictional Statement 17-18, to an unrelated, pending case before the National Labor Relations Board in which there is no established record is not appropriate.

The Sixth Circuit aptly noted in *McDaniel* v. *Essex International, Inc., supra,* 571 F.2d at 343: "This court is aware of the national policy of promoting labor peace which is served by the union security provisions of Taft-Hartley. Since July 2, 1964, however, there has been no national policy of higher priority than the elimination of discrimination in employment practices. *See, Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 87 (1974)." (citations omitted.)

III.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal or affirm the decision below.

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December 12, 1979

APPENDIX

APPENDIX A

SUPREME COURT OF ALASKA

No. 2554

BERNADINE BALD, *Appellant*,

v.

RCA ALASCOM AND TEAMSTERS LOCAL 959, *Appellees*.

October 14, 1977

As Corrected December 8, 1977

Opinion

Before RABINOWITZ and CONNOR, JJ., and DIMOND, J. Pro Tem.

CONNOR, Justice.

In this case, a worker whose religious convictions forbid affiliation with a labor union alleges that she was wrongfully discriminated against by her employer and the union which represents its employees. The issue on appeal does not concern the merits of her allegations, but only whether this case is within the jurisdiction of the state courts. The union and the employer argue that under the principle of federal preemption, exclusive jurisdiction rests with the National Labor Relations Board (NLRB). We have concluded that the courts of Alaska do have jurisdiction over this case.[1]

Bernadine Bald, plaintiff and appellant, was employed as a long-distance telephone operator by defendant and appellee RCA Alaska Communications, Inc. (hereafter

[1] In *Wondzell v. Alaska Wood Products, Inc.*, Nos. 2792 & 2804, now pending before us, we will consider resolution of the merits of a dispute of this type.

"Alascom"). Her position was covered by a union contract with Teamsters Local 959, the other defendant and appellee. The contract contained a union security provision, requiring all employees to join the union within 30 days of initial employment, and thereafter maintain union membership. The employment was within the coverage of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (NLRA).

Bald is an adherent of the Seventh-Day Adventist faith. That religious persuasion forbids membership in, or contribution to, labor organizations.[2] In August 1974, she ceased paying union dues, and offered to contribute an equivalent sum to a mutually-agreed-upon charity and forego all union benefits. She alleged that Alascom and the Teamsters would not agree to such an accommodation.

She thereupon filed this action in superior court, alleging violations of AS 18.80.220(a)[3] and the federal and state

[2] We take judicial notice from the record in *Wondzell v. Alaska Wood Products, Inc., supra,* n.1 which is pending before us, that Seventh-Day Adventists believe that it is contrary to God's will for them to associate with labor organizations. They cite passages in the Bible which instruct workers to obey their employers, and hence believe that unions stir up labor-management strife which would not exist if workers followed these Biblical precepts rather than organizing. They believe that economic coercion, such as strikes and boycotts, is not a proper means to further even the most legitimate and desirable ends. Further, they are concerned that a labor union demands of them loyalty to earthly goals which is contrary to their first loyalty to God. Paying money to the union without joining it is not an acceptable compromise; giving financial support to a union, as well as having one's name on its membership rolls, is unacceptable to Adventists.

[3] AS 18.80.220(a) reads in relevant part as follows:

"*Unlawful employment practices.* (a) It is unlawful for

(1) an employer to refuse employment to a person, or to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, religion, color or national origin, or because of his age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood when the reasonable demands of the position do not require discretion on the basis of age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood;

(2) a labor organization, because of a person's sex, marital status, changes in marital status, pregnancy, parenthood, age, race, religion, color or national origin, to exclude or to expel him from its membership, or to discriminate in any way against one of its members or an employer or an employee; . . . ."

Bills of Rights. She sought damages and declaratory and injunctive relief.

The defendants moved to dismiss on the grounds that the NLRA preempts the field so that she may not rely on the state civil rights laws, and that exclusive jurisdiction to pass upon questions related to the federal act is vested in the NLRB and the federal courts.[4] The trial court on September 24, 1975, granted the motion for want of jurisdiction over the subject matter. From that judgment this appeal

[4] The issues of substantive preemption and jurisdiction are intertwined. The United States Supreme Court declared in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), that the NLRB has exclusive jurisdiction over activities which are "arguably" subject to sections 7 or 8 of the NLRA, thus excluding both state and federal court jurisdiction in such matters. However, there are exceptions to this exclusive jurisdiction. Sections 301 and 303 of the Labor Management Relations Act, 29 U.S.C. § 185 and § 187, respectively, provide for federal court jurisdiction over § 8(b)(4) unfair labor practice litigation and breaches of the collective bargaining agreement. *See Smith v. Evening News Ass'n,* 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed. 2d 246 (1962). In *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), the Supreme Court held that there is federal court jurisdiction over litigation involving a breach of the duty of fair representation. Despite the NLRB's extensive jurisdiction, it does not normally entertain claims under either federal or state civil rights laws. Hence a decision that AS 18.80 is preempted by the federal law would also be a decision that the proper forum is the NLRB. A decision that Ms. Bald can maintain her state cause of action would also be a decision that she is entitled to proceed in state court. AS 22.10.020(c).

was taken. Thus, the merits of Bald's claim are not before us.

At the time of the hearing in superior court, Bald had not been discharged from her job. Her brief states that she was discharged by Alascom, at the request of the Teamsters, after the hearing.

I

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), permits union security agreements as an exception to its general rule that an employer may not discriminate against a worker because of his membership or nonmembership in a union.[5] Section 8(b)(2), 29 U.S.C.

[5] Section 8(a)(3) makes it an unfair labor practice for an employer:

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

§ 158(b)(2), in forbidding unions to discriminate against workers for reasons other than nonpayment of dues, by negative implication permits discrimination for that reason.[6]

The preemption principle is derived from the supremacy clause of article VI of the federal Constitution, which declares that federal law shall be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The principle is far from easy to apply. No two cases are factually alike. Preemption tests or standards are necessarily phrased in general or abstract terms which are of limited usefulness in applying the principle to a concrete set of facts. In each case, a balance must be struck between the competing demands of federal uniformity and local autonomy. We must look to the policy, intent, and context of the federal statute to determine whether application of the state laws would frustrate the operation of the federal one. *See generally, e. g., Hines v. Davidowitz*, 312 U.S. 52, 66-68, 61 S.Ct. 399, 403-05, 85 L.Ed. 581, 586-87 (1941); *Id.* at 75-81, 61 S.Ct. at 408-10, 85 L.Ed. at 591-95 (Stone, J., dissenting); G. Gunther, *Cases and Materials on Constitu-*

[6] Section 8(b)(2) makes it an unfair labor practice for a union:

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

tional Law 357-67 (9th ed. 1975); Note, Pre-emption as a preferential Ground: A New Canon of Construction, 12 *Stan.L.Rev.* 208 (1959).

In the field of labor-management relations, the leading case discussing the principles of preemption is *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). In *Garmon,* the Supreme Court set aside a state court award of tort damages to an employer against a union for engaging in recognitional picketing. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by . . . or constitute an unfair labor practice under [federal labor statutes]," the Court said, exclusive jurisdiction is in the NLRB and state remedies are preempted. *Id.* at 244, 79 S.Ct. at 779, 3 L.Ed.2d at 782.

Additional light is shed on this subject by two other United States Supreme Court cases. *International Association of Machinists* v. *Gonzales,* 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958), held that a state damage remedy for wrongful expulsion from a union was not preempted. The Court reached the opposite result, however, in *Street, Electric Railway and Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), where the union not only expelled the worker but, pursuant to a union shop contract, also procured his dismissal from his job, for tardy payment of dues. In *Lockridge,* the Court distinguished *Gonzales* on the ground that *Gonzales* implicated only internal union matters, while *Lockridge* concerned the construction of a contract term, the union security clause, which is subject to pervasive and complex federal regulation.

The *Garmon* court distinguished *Gonzales* on the ground that wrongful expulsion was "a merely peripheral concern" of the federal labor statutes. 359 U.S. at 243, 79 S.Ct. at 778, 3 L.Ed.2d at 782. On preemption by the NLRA, *see generally Farmer v. United Brotherhood of Carpenters and Joiners,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

Likewise, the *Garmon* court cited cases recognizing that there is no federal preemption of "interests . . . deeply rooted in local feeling and responsibility" absent clear congressional intent to preempt. 359 U.S. at 244, 79 S.Ct. at 779, 3 L.Ed2d at 782. The cited cases upheld the states' power to take action to prevent or quell labor-related violence which threatens the public peace.[7] But state employment practices laws have also been held to reflect strong local interests which ought to be recognized if at all possible. *DeCanas v. Bica,* 424 U.S. 351, 356-58, 96 S.Ct. 933, 936-59, 47 L.Ed.2d 43, 49-50 (1976) (law forbidding hiring of illegal aliens not preempted); *Simpson v. Providence Washington Ins. Group,* 423 F.Supp. 552, 556 (D.Alaska 1976) (law forbidding discrimination against persons over 65 not preempted). And, as we shall discuss later in this opinion, there is reason to believe that Congress itself assigned the initial battle against employment discrimination to local responsibility when it placed an exhaustion of state remedies requirement in the 1964 Civil Rights Act. 42 U.S.C. § 2000e-5, discussed on pages 13-15 *infra.*

Courts considering preemption problems somewhat similar to the one facing us have found that state laws were not preempted.

In *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.,* 372 U.S. 714, 724, 83 S.Ct. 1022, 1027, 10 L.Ed.2d 84, 91 (1963), it was claimed that Continental had violated state laws against racial discrimination in hiring. Continental answered the claim with the assertion, *inter alia,* that the Railway Labor Act, 45 U.S.C. § 151 *et seq.,* had preempted the field. The Railway Labor Act is similar to the National Labor Relations Act, and sets out

[7] The United States Supreme Court recently held that under this rule a tort action in state court by a worker against his union for intentional infliction of emotional distress was not preempted. *Farmer v. United Brotherhood of Carpenters and Joiners,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

the principles of union recognition and collective bargaining for employees of interstate carriers. The court decided against Continental. Nowhere did that act mention racial discrimination, the Court pointed out. Its purpose of regulating union activity would in no way be frustrated by enforcing state civil rights laws. Even if the purpose of the federal and state laws were the same, the Court said, there is no preemption unless enforcement of the state law would in some way frustrate the aims of the federal one. 372 U.S. at 722, 83 S.Ct. at 1026, 10 L.Ed.2d at 90.

In *Walker Mfg. Co. v. Industrial Comm.*, 27 Wis.2d 669, 135 N.W.2d 307 (1965), the Wisconsin Supreme Court held that a state law against age discrimination in employment was not preempted by the NLRA even with respect to employment under NLRB jurisdiction. The court relied principally on *Continental*, and held that the state and federal laws served different purposes, that age discrimination is a "merely peripheral concern" of the federal labor laws, and that enforcement of the state law would in no way frustrate federal labor policy.

New York and California courts have held that they have jurisdiction to enjoin racial segregation in unions which hold collective bargaining contracts under federal labor law, despite arguments that the NLRA preempts the field. *Williams v. Int'l Brotherhood of Boilermakers*, 27 Cal.2d 586, 165 P.2d 903 (1946); *James v. Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329 (1944); *Gaynor v. Rockefeller*, 21 A.D.2d 92, 248 N.Y.S.2d 792, 803-04 (App.Div.1954), *aff'd*, 15 N.Y. 2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627 (1965).

In *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), the Supreme Court held that the preemption principle did not bar tort suits by union members against unions for breach of duty of fair representation. This duty, imposed by federal labor law, requires the union to represent fairly all workers in its bargaining unit and not favor some at the expense of others.

In the case at bar, as in *Vaca* and the California and New York cases, the principal dispute is not between labor and management but between an individual worker and the union. Ms. Bald had no grievance against her employer until the union sought her dismissal for nonpayment of union dues.

The union and the employer in this case seek to distinguish these cases. Discrimination on the basis of failure to pay union dues, they argue, differs for these purposes from all other forms of discrimination. Accusations that a union or employer has discriminated on the basis of race or sex or age are merely peripheral concerns of the federal labor laws, they acknowledge. On the other hand, it is their position that sections 8(a)(3) & (b)(2) of the NLRA clearly give unions and employers the power to discriminate against workers who do not pay union dues. Far from being peripheral, union security is central to the entire scheme of federal labor-management law.

While this argument has some surface appeal, there are countervailing considerations which persuade us to reject it. It is necessary to inquire further into the nature of the state interest in regulation and the potential for interference with the federal regulation. Under a formalistic application of the *Garmon* principle, it is arguable that this suit would be preempted. However, as the United States Supreme Court noted in *Farmer* v. *United Brotherhood of Carpenters and Joiners*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338, 349 (1977), there are other factors to be considered in departing from a strict application of the *Garmon* rule. We think there is little risk that carefully drawn relief would interfere with the effective administration of national labor policies. Finally, the law of employment discrimination illustrates an express and overriding state interest. The National Labor Relations Act is only one of the two bodies of law which is of relevance to this appeal. We now turn to a discussion of the civil rights laws which

have been enacted to ban religious discrimination in employment.

II

Employment discrimination by either employers or unions on the basis of religion is forbidden by 42 U.S.C. § 2000e-2. This section is part of Title VII of the Civil Rights Act of 1964, and is administered by the federal Equal Employment Opportunity Commission.

The presence of § 2000e-2 on the federal statute books supports Ms. Bald's position. Of course, one federal statute cannot preempt another, so § 2000e-2 does not compel the conclusion that AS 18.80 is not preempted. But it indicates that there is a federal statute and a federal agency which, unlike the NLRA and the NLRB, have the explicit purpose of preventing religious discrimination in the labor-management context.[8] The Civil Rights Act prohibits discrimination by unions as well as by employers. Even within the federal government, the NLRB is not the only agency concerned with those matters.

Furthermore, § 2000e-5, also part of Title VII, requires exhaustion of state remedies, if any, before federal remedies—administrative or judicial—may be utilized.[9] In light of this, a decision that another federal statute preempts those state remedies would be difficult to justify, particu-

[8] We reviewed the similarities and differences between Title VII and AS 18.80 in *Loomis Electronic Protection, Inc. v. Schaefer*, 549 P.2d 1341 (Alaska 1976), and in *Hotel Employees Union Local 879 v. Thomas*, 551 P.2d 942 (Alaska 1976). The differences are largely in remedies, not of relevance to this case; in substance the two are similar. The state commission's regulations on religious discrimination incorporate the federal regulations under Title VII. 6 AAC 30.010(m)(2); 29 C.F.R. § 1605.1.

[9] In 42 U.S.C. § 2000e-7, Congress explicitly stated that the 1964 Civil Rights Act preempted state segregation laws, but not state equal rights and anti-discrimination laws.

larly since the congressional intent is quite clear that Title VII is to be read harmoniously with the NLRA.

The relationship of the NLRA and the Civil Rights Act was reviewed by the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). A worker fired from his job, allegedly because of his race, filed a grievance pursuant to the grievance procedure in his union contract, which had been negotiated under the NLRA. The grievance arbitrator decided against him. After exhausting administrative remedies in the Equal Employment Opportunity Commission, the worker brought a civil action in federal district court under Title VII of the Civil Rights Act, charging again that he had been terminated because of his race. The employer urged that arbitration and Title VII were exclusive remedies and that the worker, having taken his chance with one could not then resort to the other. On this basis, the lower courts dismissed the suit.

The Supreme Court unanimously reversed. In so doing, it relied upon congressional intent that there be multiple forums in which to seek remedies for racial discrimination. *Id.* at 47-48, 94 S.Ct. at 1019, 39 L.Ed.2d at 158.[10] The Court explained that the worker had a right under his union contract to nondiscriminatory treatment, but he also had an entirely separate statutory right to be free from discrimination, one that could not be waived even if his union so wished, and one that he would have whether or not there was a union contract. *Id.* at 51-54, 94 S.Ct. at 1021-22, 39 L.Ed.2d at 159-62.

[10] *Accord, United Packinghouse, etc. Union v. N. L. R. B.*, 135 U.S.App.D.C. 111, 118-19, 416 F.2d 1126, 1133-34 n. 11, *cert. denied*, 396 U.S. 903, 90 S.Ct. 216, 24 L.Ed.2d 179 (1969), which considered the other side of the coin: whether the NLRB was ousted of jurisdiction over racial discrimination by Title VII. The court held that it was not.

> "We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."

Id. at 59-60, 94 S.St. at 1025, 39 L.Ed.2d at 164-65.[11]

Defendants cite § 8(a)(3) of the NLRA, which states that "nothing . . . in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization [for a union shop]." In *Cooper v. General Dynamics,* 533 F.2d 163, 169-70 (5th Cir. 1976) (2-1 decision), *cert. denied,* —— U.S. ——, 97 S.Ct. 2972, 53 L.Ed.2d 1091 (1977), a Title VII case brought by Seventh-Day Adventist employees who would not pay union dues, the employer-defendant made this argument unsuccessfully. The court held that the employees' claim was cognizable under Title VII even though they worked under an agency shop arrangement negotiated pursuant to § 8(a)(3) of the NLRA. To read § 8(a)(3) to override the Civil Rights Act, the court pointed out, would effectively write it into

[11] *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 72, 95 S.Ct. 977, 989, 43 L.Ed.2d 12, 29 (1975), cited by defendants, is not to the contrary. It reaffirms *Alexander's* holding that employees under a union contract may pursue the remedies provided by the civil rights laws. As Ms. Bald points out, that is exactly what she is trying to do.

Nor is *Buckley v. American Fed'n of Television & Radio Artists,* 496 F.2d 305, 312 (2d Cir.), *cert. denied,* 419 U.S. 1093, 95 S.Ct. 688, 42 L.Ed.2d 687 (1974), to the contrary. There the Second Circuit held that a challenge to a union security agreement by workers whose political beliefs were opposed to union membership, was within the exclusive jurisdiction of the NLRB. However, in *Buckley* there were no allegations of discrimination forbidden by the civil rights laws. Where, as here, such allegations are made, *Alexander* appears to dictate a contrary result.

the federal Constitution. A literal interpretation of § 8(a)(3) would make the 1964 Civil Rights Act inapplicable to every employment covered by the NLRA. It is clear that this was not the intent of Congress in enacting the Civil Rights Act (the later of the two statutes), nor has it been the interpretation of courts which have considered the question, including the United States Supreme Court.

The National Labor Relations Act and the state and federal civil rights acts were enacted 30 years apart, each in response to one of the most monumental social crises of the century. They were enacted for different purposes. The NLRA was enacted in 1935 to alleviate industrial strife and improve the lot of workers. 29 U.S.C. § 151. It was substantially amended in 1947 to prevent abuses by unions of the power that the 1935 act had given them. *Id.* §§ 141, 151. The civil rights laws were passed in an attempt to prevent the use of irrelevant and stigmatizing criteria to bar persons from employment for which they were well qualified. *See* AS 18.80.200.

We have concluded that there is nothing necessarily inconsistent in these aims, and that the laws Alaska has enacted to promote the latter purpose need not give away to the federal laws enacted for the former purpose. We hold that the National Labor Relations Act does not preempt AS 18.80 and does not deprive the courts of this state of jurisdiction to hear the instant case. We, of course, intimate no view on the proper resolution of the merits of this case.

The judgment of dismissal is reversed, and the case is remanded to the superior court for further proceedings on the merits.

APPENDIX B

STATEMENT BY THE AFL-CIO EXECUTIVE COUNCIL

ON

UNION MEMBERSHIP AND RELIGIOUS OBJECTORS

New York, New York

September 20, 1965

In connection with consideration by the Congress of repeal of Section 14(b) of the Taft-Hartley Act, representatives of certain religious groups testified that some of their members have personal religious convictions which may stand in the way of their formally joining unions or, to varying degrees, participating in or financially supporting union activities.

A number of national and international unions have in the past worked out arrangements with particular religious groups for handling this problem of individual religious objectors, but other unions have not yet done so.

The Senate Labor Committee has incorporated in the bill repealing Section 14(b) provisions giving to religious objectors the option of contributing to a non-religious charity, designated by the union, sums equal to union dues and initiation fees—provisions which the AFL-CIO supports. These provisions become operative where there are no voluntary agreements covering these matters. It is the conviction of the AFL-CIO that such voluntary union agreements are the best method for handling such matters.

Therefore this Executive Council declares it to be the policy of the AFL-CIO that unions should accommodate themselves to genuine individual religious scruples. We strongly urge all national and international unions affiliated with the AFL-CIO, that have not already done so, to:

1. Immediately adopt procedures for respecting sincere personal religious convictions as to union membership or activities; and

2. Undertake to insure that this policy is fully and sympathetically implemented by all local unions.

I hereby certify that this is a true copy taken from the minutes of the AFL-CIO Executive Council meeting held September 20, 1965.

/s/ LANE KIRKLAND
Lane Kirkland, Sec.-Treas. AFL-CIO